REMARKS

1. In response to the Office Action mailed November 24, 2008, Applicants respectfully request reconsideration. Claims 139-176 were last presented for examination. In the outstanding Office Action, claims 139-176 were rejected. By the foregoing Amendments, no claims have been amended, added or cancelled. No new matter has been added. Upon entry of this paper, claims 139-176 will be pending in this application. Of these thirty-eight (38) claims, 4 claims (claims 139, 156, 165, and 174) are independent.

2. Based upon the above Amendment and following Remarks, Applicants respectfully request that all outstanding objections and rejections be reconsidered, and that they be withdrawn.

Art of Record

3. Applicants acknowledge receipt of form PTO-892 listing additional references identified by the Examiner.

Drawing

4. Applicants note with appreciation the Examiner indicating that the drawing(s) filed on June 25, 2007 have been accepted.

Priority Claim

5. Applicants note with appreciation the Examiner's acknowledgement of foreign priority under 35 U.S.C. §119.

Claim Rejections under §102 Givens

6. Claims 139-144, 147-152, 154-156, 159-165 and 168-174 are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. Patent No. 6,916,291 to Givens, *et al.* (hereinafter, "Givens"). For at least the following reasons, Applicants respectfully disagree.

Givens Fails to Anticipate Applicants' Claimed Invention

7. Givens is directed to performing diagnostic hearing tests which use a computer network to allow interactions between a test administration site and one or a plurality of remote patient sites. (*See*, Givens, Abstract; col. 8, ln. 57.) In Givens, "the test is relayed from the test administration site 10 to a desired patient or local site 20 through the use of a computer network 15." (*See*, Givens, col. 8, ln. 67 – col. 9, ln. 3.) According to Givens, "in operation, the test is ***administered by a clinician or audiologist at the test administration site 10***, remote from the patient site 20, in a manner which can allow ***interaction…between the user and the clinician during*** at least a portion of the administration of the test." (*See*, Givens, col. 9, ll. 13-17; emphasis added.) Furthermore, Givens states that "the system can be configured to allow the ***clinician at the test administration site 10 to control the test*** sequence and auditory hearing assessment tones from the remote administration site. Thus, the hearing test can be performed such that the hearing tones are generated and output locally at the patient site 20 in response to ***commands selecting the desired tone / level which are transmitted from the expert or test administration site*** to the local site via the computer network." (*See*, Givens, col. 9, ll. 35-43; emphasis added.) It is clear that the device and system described in Givens is controlled by or operated by an expert / clinician from the "test administration site".

8. Regarding the recipient's response, Givens makes clear that "the system is also configured to ***accept the patient's input or response during the test and transmit*** the associated data back ***to the administration site where it can be considered and evaluated***. The system can also allow the ***test administrator*** (typically an audiologist) to adjust the test sequence or tone based on the patient's indicated response ***during*** the testing protocol." (*See*, Givens, col. 9, ll. 47-52; emphasis added.) Again, Givens contemplates what may be characterized as a real-time testing situation in which the recipient's (patient's) response is transmitted to the audiologist during the test, and where the test itself is being controlled by the audiologist. As one having skill in the art will appreciate, the testing device and method in Givens is similar to a conventional in-clinic testing situation except that the signals travel over a network to a recipient who is remote.

9. Applicants' independent claim 139 recites, in part, "a recipient subsystem, comprising a recipient interface, configured to receive one or more recipient input, from said recipient

interface, and to ***perform the one or more tests received from and independent of the clinician subsystem*** on said prosthesis, in response to said user input, to generate the result data for communication to said clinician subsystem." (*See*, Applicants' independent claim 139, above; emphasis added.) Applicants assert that the testing device and method of Givens fails to anticipate or render obvious at least these elements of Applicants' claim 139. Similarly, Applicants' independent claims 156 and 165 recite, in part, "***performing*** said customized one or more tests on the prosthesis, ***using the recipient subsystem and independent of the clinician subsystem***, to generate the result data." (*See*, Applicants' independent claims 156 and 165, above; emphasis added.) Finally, Applicants' independent claim 174 recites, in part, "***means for performing*** said customized one or more tests on the prosthesis, ***using the recipient subsystem and independent of the clinician subsystem***, to generate the result data." (*See*, Applicants' independent claim 174, above; emphasis added.)

10. As noted above, Givens describes a system in which the test is being performed ***by*** the clinician's computer ***via*** the recipient's computer. Temporally speaking, the Givens testing system requires that the clinician's computer and the recipient's computer cooperate or interact during the entire test. In other words, in Givens, the clinician's computer transmits the test, which causes the test to be performed on the recipient's hearing prosthesis by the clinician's computer, followed by a response sent back to the clinician's computer. Therefore, Givens fails to describe performing the test "independent of the clinician subsystem" or "using the recipient subsystem and independent of the clinician subsystem" as claimed by Applicants.

Givens Misunderstood or Misapplied by the Examiner

11. Furthermore, the Examiner asserts that Givens describes "to perform the one or more tests received from and independent of the clinician subsystem on said prosthesis, in response to said user input to generate the result data ([Givens,] column 19, lines 48-60, column 20, lines 24-46 and column 23, lines 29-44 and 54-63." (*See*, Office Action, pg. 3.) Applicants assert that the Examiner is misunderstanding or misapplying Givens in at least the following ways.

12. First, the "stand alone device" described in column 19, line 49 of givens refers to a stand alone device which has its own "remote communication link". This is made clear by the

sentence subsequent to the portion cited by the Examiner, which states, "***Alternatively***, the local device 450 can be configured to be operatively engageable with a local computer or pervasive communications device during the test, which in turn, may ***provide the modem or communication link to the network 15 and to the remote [clinician's] site***." (*See*, Givens, col. 19, ll. 60-65; emphasis added.) Clearly, the portion relied upon by the Examiner and the next sentence cited above refer to embodiments of the Givens system which either has a communications link built-in to the recipient's system or a separate (not stand-alone) hardware which provides that communications link to the clinician's computer.

13. Second, the Examiner appears to rely on a portion of Givens as describing Applicants' the recipient-computer performing tests "received from and independent of the clinician subsystem." (*See*, Office Action, pg. 3.) In fact, Givens states, "the local device 450 is configured to generate ***stimulation signals*** corresponding to the testing protocol associated with the desired test." (*See*, Givens, col. 20, ll. 25-28; emphasis added.) As one having ordinary skill in the art will appreciate, this portion of Givens is describing what the recipient computer does with the test received from, and still controlled by, the clinician's system. In conjunction with FIG. 11 of Givens, this portion of Givens is describing the generation of the actual stimulation signals 480 which are provided to the patient. This is apparent in Givens, which states, "the ***stimulation signals 480*** are transmitted from an output source located in the ear probe assembly 475, such as one or more speakers 482 having suitable operating characteristics in the desired frequency range." (*See*, Givens, col. 20, ll. 28-32; emphasis added.) Clearly, as can be seen in FIG. 11 of Givens, the stimulation signals 480 are those which are presented to the patient. Therefore, even this portion of Givens relied upon by the Examiner describes a test that is still controlled by, and therefore not independent from, the clinician's computer.

14. Finally, the Examiner appears to believe that the server / client configuration described in Givens at column 23, lines 29-44 and 54-63 and illustrated in FIG. 17 is describing a system in which a "client" interacts with a server to perform a test, where the "client" is apparently believed to represent the patient. (*See*, Office Action, pg. 3.) In fact, Applicants note that Givens, in describing its FIG. 16, actually refers to a "client" in a client / server context as will be known to persons having ordinary skill in the computer arts. Furthermore, this section of Givens relied upon by the Examiner is describing a system in which a third computer, apart

from the clinician's computer and the patient's computer, can be used to "change parameters" on the patient's hearing prosthesis. As shown in FIG. 16 of Givens, "client" 1600 interacts via network 1605 with a web server 1610 with an audiometer 1620. (*See*, Givens, FIG. 16.) "The client 1600 displays the status information ***for the operator*** and determines, for example, by ***receiving input from the operator, if any parameters are to be changed*** (block 1720)." (*See*, Givens, col. 23, ll. 41-44.) The changes are passed on by the web server 1610 and applied, and further changes requested from the operator "until no changes in the parameters are needed (block 1720)." (*See*, Givens, col. 23, ll. 51-53.) The fact that this portion of Givens focuses heavily on the clinician's interaction in changing parameters in the recipient's hearing prosthesis is further evidence that Givens describes a system which is not independent of the clinician's computer or subsystem.

15. Therefore, because Givens does not teach a system which "perform[s] the one or more tests ***received from and independent of the clinician subsystem***" or "performing said customized one or more tests… using the recipient subsystem and ***independent of the clinician subsystem***, to generate the result data," Applicants assert that it is impossible for Givens to anticipate or render obvious Applicants' invention as claimed. Applicants further assert that the other art of record also fail to teach or suggest that which is missing from Givens. Therefore, Applicants respectfully request that the rejections of claims 139, 156, 165 and 174 under 35 U.S.C. §102(e) be reconsidered, and that it be withdrawn.

Claim Rejections under §103 Faltys in view of Alexandrescu

16. Claims 139-176 are rejected under 35 U.S.C. 103(a) as being unpatentable over Faltys in view of U.S. Patent No. 5,909,497 to Alexandrescu, *et al.* (hereinafter, "Alexandrescu").

17. The Examiner asserts that Faltys teaches many of the features of Applicants' claimed invention, as detailed in a prior Office Action, the Examiner acknowledges that "Faltys does not explicitly indicate that the interfaces are provided by separate computers connected by the Internet to allow independent testing to be performed by the recipient interface." The Examiner then asserts that "Alexandrescu teaches a programming hearing aid instrument and programming method thereof including a recipient interface provided by a computer located

remote[ly] from a clinician interface wherein the recipient interface is operable to obtain software instructions from the hearing prosthesis, perform testing using the recipient interface and deliver data specific to the hearing prosthesis electronically to the clinician / specialist interface." (*See*, Office Action, pg. 19.) The Examiner justifies this combination because "it would have been obvious… because, as suggested by Alexandrescu, the combination would have improved the recipient's programming of the device by providing specific programming for the environment in which the recipient is intending to use the device." (*See*, Office Action, pg. 20.)

18. Alexandrescu is directed to a programming system which comprises a "watchdog unit 41" which monitors the sound received by the hearing device in order to detect programming codes. (*See*, Alexandrescu, col. 4, ll. 24-29.) The programming code may be preceded by a "leader" signal and concluded by a "trailer" signal, which is used to begin and end the programming. (*See*, Alexandrescu, col. 4, ln. 67, col. 5, ln. 6.) A "signal processing means 5" processes sounds from the "sound pressure level sensing means 11" (e.g. microphone) and provides the signal to the recipient to provide hearing sensation, when not in programming mode. Upon detecting the "leader" signal, a switch 43 that is connected to both the signal processing means 5 and an "interface 50" directs the programming code to the "interface 50" so that the programming of signal processing means 5 can be changed. (*See*, Alexandrescu, col. 4, ll. 4-35.) Interface 50 comprises "means for receiving program codes 51", a "programming interface 53" and "means for transmitting programming codes 55." (*See*, Alexandrescu, col. 4, ll. 4-19.) Programming interface 53 of Alexandrescu is described as being used to "translat[e] the program codes into a programming language compatible with the programming language of the signal processing means 5, in order to program signal processing means 5." (*See*, Alexandrescu, col. 4, ll. 14-18.) A communication port 7 on signal processing means 5 receives the translated programming language from programming interface 53, as shown in FIG. 2 of Alexandrescu. The programming codes are described as being received and transmitted "through a telephone line." (*See*, Alexandrescu, col. 5, ln. 67.)

19. Alexandrescu provides a "means for transmitting programming codes 55" which is said to receive programming code from signal processing means 5, via programming interface 53 which provides any translation necessary so that the audiologist or hearing aid specialist's

computer can use the codes. The means for transmitting programming codes 55 then transmits that code through output transducer 31 for transmission to the hearing aid specialist. (*See*, Alexandrescu, col. 5, ll. 17-22.) The means for transmitting programming codes 55 is said to also comprise a switch 61 which switches between the output 33 of the signal processing means 5 and the output 59 of the programming interface 53, to provide the signal received to the input 35 of the output transducer means [31]. Thus, when programming code is to be transmitted via programming interface 53, switch 61 switches to receive the programming codes from output 59 of interface 53. When ambient sound is to be provided via signal processing means 5 as stimulation to the user, switch 61 switches to receive the stimulation codes from output 33 of signal processing means 5. As illustrated in FIG. 7 of Alexandrescu, a hollow "acoustical adapter 101" is described as receiving "hearing instrument 1" in the funnel-shaped element 105 that is placed adjacent the telephone handset's speaker, with "telephone coupler 109" placed near the telephone handset's microphone. (*See*, Alexandrescu, col. 5, ll. 50-67.) Using acoustical adapter 101, Alexandrescu describes both receiving as well as transmitting programming codes for a system which receives and sends programming codes through acoustical sound.

20. Thus, Alexandrescu is described as being able to monitor ambient sound in order to either provide the ambient sound as stimulation for the patient, or to use programming code it detects in the ambient sound in order to program the signal processing means 5 in the hearing prosthesis. In addition to programming the hearing prosthesis by sending programming codes through a telephone, Alexandrescu also describes embedding programming codes into television content, for example in content with closed-captioning signals. "Thus, for example, if the particular broadcast includes a loud noise, such as an explosion, the television signal includes, shortly before the explosion, program codes to modify the response parameters of the hearing instrument for this loud noise." (*See*, Alexandrescu, col. 8, ll. 10-13.) Alexandrescu also describes having multiple programming units in different rooms of a patient's house, such that the patient's prosthesis can be programmed differently for each of those rooms, because "the acoustics of a user's house may be different from one room to another." (*See*, Alexandrescu, col. 8, ll. 22-23.) Finally, instead of transmitting programming codes from a remote location by telephone, Alexandrescu also describes sending the programming codes through the Internet to a

user's computer, where the programming codes are then "appropriately decoded… so as to form part of the audio signal." (*See*, Alexandrescu, col. 8, ll. 1-3.) As described earlier, the "watchdog unit 41" is described as monitoring the audio signal in order to detect programming code and to begin and later end the programming session.

21. As set forth in §2142 of the M.P.E.P., "to establish a *prima facie* case of obviousness… the prior art reference (or references when combined) must teach or suggest all of the claim limitations." Without addressing the propriety of the Examiner's combination of Faltys and Alexandrescu, Applicants respectfully assert that even if the references were combined as proposed by the Examiner, the resulting combination would still fail to teach all elements of Applicants' claimed invention.

22. As noted above, Alexandrescu describes a system used to program a hearing device, and not "a system for performing one or more ***tests*** on a prosthesis having ***one or more implantable components implanted in a recipient*** comprising… a recipient subsystem, comprising a ***recipient interface, configured to receive one or more recipient input, from said recipient interface***, and to perform the one or more tests received from and ***independent of the clinician subsystem*** on said prosthesis, in response to said user input, to generate the ***result data*** for communication to said clinician subsystem." (*See*, Applicants' independent claim 139.) First, neither Alexandrescu nor Faltys describes, nor would the combination thereof result in, a "recipient interface configured to receive one or more recipient input from said recipient interface… and to perform the one or more tests received from an independent of the clinician subsystem" as claimed by Applicants. Contrary to the Examiner's assertion, on page 19 of the Office Action, that Alexandrescu describes a "recipient interface provided by a computer located remote[ly] from a clinician interface wherein the recipient interface is operable to obtain software instructions from the hearing prosthesis, perform testing using the recipient interface and deliver data specific to the hearing prosthesis electronically to the clinician / specialist interface", Alexandrescu does not provide any interface which is "configured to receive one or more recipient input" as claimed by Applicants. Furthermore, Alexandrescu, nor Faltys or any device resulting from their combination, also does not describe "perform[ing] the one or more tests received from and independent of the clinician subsystem" since Alexandrescu describes all programming being initiated by and conducted with an outside source, such as "hearing aid

specialist." (*See*, Alexandrescu, col. 5, ll. 17-47.) Furthermore, Alexandrescu describes programming the hearing device, rather than performing tests on its hearing device. When Alexandrescu states that "a hearing aid specialist may need to obtain information about the resident response parameters within the signal processing means 5", and then continues on to describes how the means for transmitting programming codes 55 transmits the programming codes as an audio signal through, for example, the hollow tube tool noted above, Alexandrescu is describing the hearing aid specialist receiving, analyzing and presumably providing further testing or programming codes to the hearing device user. Therefore, Alexandrescu cannot cure the admitted deficiency of Faltys, contrary to the Examiner's assertions, and therefore the combination of Faltys and Alexandrescu fails to comply with §2142 of the M.P.E.P. which requires that "to establish a *prima facie* case of obviousness… the prior art reference (or references when combined) must teach or suggest all of the claim limitations." Accordingly, Applicants respectfully request that the rejections of these claims under 35 U.S.C. §103(a) be reconsidered, and that it be withdrawn.

Dependent claims

23. The dependent claims incorporate all the subject matter of their respective independent claims and add additional subject matter which makes them independently patentable over the art of record. Accordingly, Applicants respectfully assert that the dependent claims are also allowable over the art of record.

Conclusion

24. In view of the foregoing, this application should be in condition for allowance. A notice to this effect is respectfully requested.

25. Applicants reserve the right to pursue any cancelled claims or other subject matter disclosed in this application in a continuation or divisional application. Any cancellations and amendments of above claims, therefore, are not to be construed as an admission regarding the patentability of any claims and Applicants reserve the right to pursue such claims in a continuation or divisional application.

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